ERNEST F. HINIKER

IBLA 79-234 Decided September 28, 1979

Appeal from decision of the California State Office, Bureau of Land Management, declaring mining claim null and void ab initio. CA MC 3682.

Appeal Dismissed.

1. Appeals -- Rules of Practice: Appeals: Generally

> Where an appellant admits in correspondence with the Department that the decision of the Bureau of Land Management State Office holding his mining claim invalid is correct, the appeal may be dismissed

APPEARANCES: Ernest F. Hiniker, pro se.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

On October 2, 1954, Ernest F. Hiniker located a quartz mining claim in the NE 1/4 sec. 17, T. 1 S., R. 15 E., Mount Diablo meridian, California. The location notice was filed for recordation in the California State Office, Bureau of Land Management (BLM), on June 16, 1977. On January 18, 1979, BLM declared the claim null and void ab initio for the reason that the claimed land was withdrawn from mineral entry by Power Site Classification No. 266, dated March 8, 1932, until passage of the Act of August 11, 1955, known as the Mining Claims Rights Restoration Act (Act), 69 Stat. 681, amended 74 Stat. 202, 30 U.S.C. §§ 621-625. This Act did not serve to validate claims like appellant's which were located prior to its passage. BLM further held that the lands were again withdrawn from all forms of appropriation under the mining laws due to their proximity to the Tuolomne River by the Wild and Scenic Rivers Act of October 2, 1968, as amended, January 3, 1975, 16 U.S.C. §§ 1271-1287, and therefore are not now open to location. Finally, BLM relied on a report from the Federal Energy Regulatory Commission which indicated that part of the claim is within the project boundary as licensed for the Don Pedro Project which was withdrawn by a Federal Power Commission (now Federal Energy Resources Commission (FERC)) Order of September 6, 1974.

Appellant responded with a letter to BLM disagreeing with the boundaries of both the power site withdrawal and the withdrawal for the river. He contended a large portion of his claim is valid and asked BLM to review their findings.

The State Office reviewed its findings and found no reason to disturb its decision pertaining to the E 1/2 NE 1/4 sec. 17. However, an error was made as related to the Tuolumne River, and BLM stated that while the claim remained invalid under the 1954 location, a portion of the claim could be relocated subject to the Mining Claims Rights Restoration Act. BLM enclosed a map showing the lands withdrawn or patented in the section to aid appellant in relocating his claim. Appellant was informed that his letter was being accepted as a notice of appeal and would be forwarded, along with the case file, to this Board. BLM informed appellant that if he did not wish to pursue the appeal he could notify the Board.

Appellant responded with a second letter thanking BLM for the map and the information. He then stated: "It looks like you are correct in this case. . . . I think the way it stands now I have to go do the discovery work and file again." Appellant has not communicated directly with this Board.

[1] In his correspondence with the State Office, appellant has admitted that the decision holding his mining claim invalid is correct. As he has shown no error in the decision, except as already rectified by BLM, the appeal is subject to dismissal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

Joan B. Thompson
Administrative Judge

I concur:

Joseph W. Goss
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN DISSENTING:

The main opinion states that the appeal concerning the No. 1 West Quartz Claim is properly dismissed. But the decision ignores appellant's letter of March 5, 1979, except to quote selectively from it to the effect that "[i]t looks like you are correct in this case."

However, appellant also states therein:

> I never knew of the act of 1932. If I had I would of handled the title change from my father Frank Hiniker in a different manner, but we thought by him failing to do his assesment [sic], and me filing on the claim, it would be the simple way to put it in my name.
>
> My father bought that claim in 1918 from Mr. Kennedy, it was from then known as the Tom Cat.
>
> I think the way it stands now, I have to go do the discovery work and file again.

It is not clear to me that appellant has conceded clearly the correctness of the decision below. "It looks like" is not a clear affirmation.

We have stated that the Board as the delegate of the Secretary, is obliged to consider everything contained in the record in determining all matters relevant to the disposition of an appeal. El Paso Products Co., 10 IBLA 116 (1973). But this doctrine seemingly has been applied only to bolster the rejection or cancellation of claimed rights under the public land laws, e.g., United States v. Leonard F. Nelson, 8 IBLA 294 (1972), rev'd on other grounds, 529 F.2d 164 (9th Cir. 1976), the ultimate decision in the case being 598 F.2d 531 (9th Cir. 1979). See United States v. Grediagin, 7 IBLA 1 (1972), and Appeal of Paul C. Helmick Co., 63 I.D. 363 (1956).

In the case at bar it would not be inappropriate to point out that if appellant records the Tom Cat claim within 3 years after October 21, 1976, that mining claim, located in 1918, may not be interdicted because of status factors.

Frederick Fishman
Administrative Judge